

OCTOBER

President's Message | Michele Flowers Brooks



Team Work is the Key!

School is back in session! August was a stressful month of getting the kids ready for school while trying to balance work and my obligations with CAPA. It is times like this that show me just how blessed I am to have such strong support in all areas of my life.

My husband has been totally disabled for the past six years. While this is never a good thing and daily we wish that he could be more ambulatory and able to get back into the workforce, it has provided my kids with the opportunity to have a parent at home with them. This means that I can come to work without the stress and concern over the quality of care my children are receiving and none of my kids have to be "latch key kids."

I do my part to make sure that hubby (David) is not the sole provider to the kids. To accomplish this, I rely on my strong support at work and within CAPA to manage this.

But for the fact that I work as a team with an excellent attorney, I would not be able to maintain my great work schedule. I cannot remember the last time I have had to work overtime or on the weekends! I know that I am blessed in this regard. I am blessed with an attorney that feels family time is just as

(Cont. on p.13)

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2006-2007 Board

President

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 president@capatx.org
 391-4973 | 391-6837 fax

President-Elect/

NALA Liaison

Pam Hum
 Pres_elect@capatx.org
 499-3832 | 499-3810 fax

Parliamentarian/ Historian

Betsy Boyt
 parliament@capatx.org
 463-2886 | 475-2453 fax

Treasurer

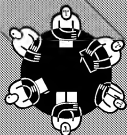
Andrea Ontiveros
 treasurer@capatx.org
 480-9300 | 422-2103 fax

Immediate Past- President

Thelma Alvarado-Garza
 past_pres@capatx.org
 476-4346 | 476-4400 fax

Secretary

Alice Lineberry, PLS, CLA
 secretary@capatx.org
 457-7000 | 457-7001 fax



2006-2007 Chairs

CLE

Jennifer Gunter
 cle@capatx.org

Community Service

Vacant
 (Contact Michele Brooks
 If interested in working on this
 committee)
 communityservice@
 capatx.org

Job Bank

Amy Igo
 job_bank@capatx.org
 936-7286

Membership

Cheryl Jung CLA, TBLS
 membership@capatx.org
 703-5049 | 708-8777 fax

Programs

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 478-1657 | 478-9016 fax

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 454-4000 | 453-6335 fax

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 pr@capatx.org
 322-5843 | 472-0532 fax

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 996-6870 | 996-6854 fax

Advertising

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 454-4000 | 453-6335 fax

Articles

articles@capatx.org

Social Events

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Michele Flowers Brooks
 mbrooks@capatx.org
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Nancy McLaughlin Scholarship

Linette Edwards
 scholarship@capatx.org
 499-3800 | 499-3810 fax

*** \$5.00 of each
 member's annual dues is
 set aside for the purpose
 of printing and publica-
 tion of the CAPA Brief.**



Calendars

OCTOBER 2006

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

schedule of events

- 12 | Board Meeting Location:
Jaime's Mexican
Restaurant
12:00 pm
- 15 | Publications Deadline
- 17 | Express RSVP Deadline
- 19 | Email RSVP Deadline
- 25 | CAPA Luncheon:
Green Pasture's
Speaker:
Dana DeBeauvoir
Topic: Researching
Electronic County Clerk

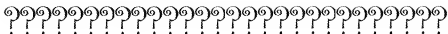
NOVEMBER 2006

Sun	Mon	Tue	Wed	Thu	Fri	Sat
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

schedule of events

- 9 | Board Meeting Location:
Jaime's Mexican
Restaurant
12:00 pm
- 15 | Publications Deadline
- 21 | Express RSVP Deadline
- 23 | Email RSVP Deadline
- 29 | CAPA Luncheon:
Green Pasture's
Speaker:
Dana DeBeauvoir
Topic: Researching
Electronic County Clerk

"Ask Judy"



Please feel free to ask any question you can think of, whether it's regarding your profession or something else completely off the wall. Send your email to askjudy@capatx.org, and then she will answer your questions in the following Brief. Here are some questions to get the ideas flowing...

Past Questions:

Question #1:

What was the first law school founded in the U.S.?

- A. Harvard
- B. Yale
- C. William & Mary
- D. Stanford

Question #2:

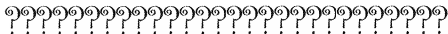
A stranger kisses you against your will. Legally, which is it?

- A. Assault
- B. Battery

New Questions:

Question #1:

Question #2:



October Luncheon

October 25, 2006

Green Pastures

11:45 am—1:15 pm

Topic: Researching Electronic County Clerk Records
Speaker: Dana DeBeauvoir

The cost of the luncheon is \$20.00 for Members and Sustaining Members or \$22.00 for Non-Members.

Please make your luncheon reservations by one of the following methods:

1. E-mail Tove Sebring at RSVP@capatx.org by noon Thursday, October 19, 2006;
2. Complete on-line RSVP form at www.capatx.org/rsvp.html by noon, October 19, 2006; or
3. Mail the Express Registration Form located at the bottom of this page with your check by Tuesday, October 17, 2006.

If you make a reservation and are unable to attend, you will still be responsible for the cost of the luncheon. IF YOU PLAN TO ATTEND THE LUNCHEON, BUT DO NOT PLAN TO EAT, PLEASE INDICATE YOUR INTENTIONS. FAILURE TO DO SO WILL RESULT IN A CHARGE FOR LUNCH. No reservations will be accepted after the deadline. The fee for returned checks will be commensurate to fees assessed by the bank. If you are paying with a firm check, please list all attendees on the check.

If you can, please try and arrive before noon. Our goal is to have the buffet line open at 11:45 am so people can be seated by noon.

RSVP's will be accepted until the Thursday before the luncheon. After that, everyone wanting to attend will be charged the \$25 late fee.

EXPRESS RESERVATION

Please make lunch reservations for # _____ at the October 25, 2006 luncheon. Enclosed is my check in the amount of \$ _____ made payable to CAPA. (Please attach a separate page for more than two names.)

Name: _____

Name: _____

Firm/Co.: _____

Firm/Co.: _____

☐ Member (\$20.00) ☐ Guest (\$22.00)

☐ Member (\$20.00) ☐ Guest (\$22.00)

☐ Attending but not eating.

☐ Attending but not eating.

☐ Vegetarian Plate Option.

☐ Vegetarian Plate Option.

☐ Receipt needed.

☐ Receipt needed.

☐ Name Tag needed.

☐ Name Tag needed.

Reservations should be mailed to: Tove Sebring, Attn: Express Lunch RSVP, c/o Bemis, Roach & Reed, LLP, 4100 Duval Road, Building I, Suite 200, Austin, Texas 78759, and must be received no later than Tuesday, October 17, 2006.

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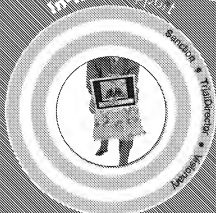
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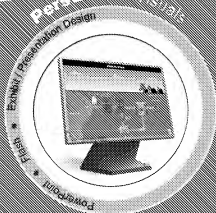
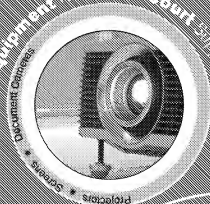


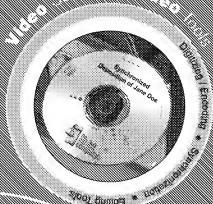
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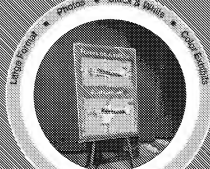
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 Friction, Wear, Lubrication

Gas/Chemical Equipment
 Human Factors/Warnings
 Industrial Accidents
 Lawn and Garden Equipment
 Machine Components
 Machine Design/Guarding
 Machinery and Equipment
 Materials Handling
 Mechanical Engineering
 Mining Operations/Standards
 Mowers (Highway)

Occupational Hazards
 Oilfield Accidents
 Patents
 Premise Accidents
 Product Design/Liability
 Safety Engineering
 Structural Failure/Design
 Seat Belts/Air Bags
 Towers/Elevators
 Trucks/Tractors/Trailers
 Vehicular Accidents

Please give us a call when you need an expert.



Volunteer Legal Services
of Central Texas

VLS News

VLS Clinics— Fall 2006

Please contact Stephanie Seuser at vlsc@capatx.org if you would like to attend, so training can be scheduled at the clinic.

6:00pm—8:00pm

Monday - Martin Middle School

October 2, 2006

October 9, 2006—**No Clinic**

October 16, 2006

October 23, 2006

October 30, 2006

6:00pm—8:30pm

Wednesday - Webb Middle School

October 4, 2006

October 11, 2006

October 18, 2006

October 25, 2006



NALA Exam Schedule & Application

Filing deadlines are approaching!

Examination Date	Application Filing Deadline**	Late Application Filing Deadline (With \$25 late filing fee)
December 1-2, 2006	October 1, 2006	October 16, 2006
March 23-24, 2007	January 15, 2007	January 29, 2007
July 20-21, 2007	May 15, 2007	May 30, 2007
November 30-December 1, 2007	October 1, 2007	October 16, 2007

CAPA's Study Group is meeting NOW—preparing for NALA Certification Exams.

For CAPA CLE or Study Group information, contact Continuing Education Chair: Jennifer Gunter 512.476.8591 or email CLE@capatx.org.

Brief Bytes—Congratulations!!!

Congratulations to Marianne Ross, CP and Stephanie Seuser, CP on passing the July 2006 CLA/CP Exam

OCTOBER 23RD

IT'S YOUR DAY*

(*As Resolved by the 79th Texas Legislature
HR 865 was Adopted and Resolution was passed
that made October 23rd Paralegal Day)

JOIN US IN CELEBRATING
THE "SUBSTANTIAL CONTRIBUTIONS"
PARALEGALS MAKE "TO THE QUALITY AND
PROFICIENCY OF LEGAL SERVICES
THROUGHOUT THE STATE"

PARALEGAL DAY SOCIAL

IRON CACTUS

606 Trinity Street

5:30 pm – 8:30 pm

THIS EVENT IS SPONSORED ENTIRELY BY THE GENEROSITY OF A
SMALL NUMBER OF CAPA'S SUSTAINING MEMBERS

YOU CAN HELP HONOR THESE EFFORTS BY ATTENDING

SEE YOU THERE!

VLS INFORMATION | Stephanie Seuser

(

Join the CAPA Group Going to Bar & Grill
Saturday, November 11, 2006

-FAQ'S

What is Bar & Grill? A musical review performed by lawyers who spoof movies, books and entertainment features by twisting them into a legal adventure.

Can they really sing? Yes, cast members have credible voices.

Is it really funny? Yes, comedy plays a primary role in each event.

Will I recognize the songs? Yes, you will recognize the melody but the words will be legal.

Can I go with a group? Yes, CAPA and PD invite you to join the group. Mark ticket reservation with the word **CAPA** on the top and send an email to vls@capatx.org and Stephanie Seuser will add you to the group list. You should select tickets in the Mezzanine section for \$15.00 to sit with group members.

Can we get together before the event for a drink? Yes, when you send the email adding you to the group list, Stephanie will send you a return email to set up the destination prior to the show. You can also elect to go to the pre-show party for an additional \$25.00 and mingle with those attending the pre-party.

Where do I send the reservation form and money for the tickets? AYL Foundation at the address listed on the reservation form.

When is Bar & Grill? Saturday, November 11, 2006 at the Paramount Theatre on Congress Avenue but reservation deadline is Friday, October 27th for the group.

Why should I go to Bar & Grill? It's fun and it benefits Volunteer Legal Services.

November 11, 2006

Paramount Theatre



Presented by Austin Bar Association

& Austin Young Lawyers Association

Benefiting Volunteer Legal Services of Central Texas



Ticket Reservation Form

Yes, I want to
witness the antics of
Bar & Grill!
Please reserve the
following tickets:

_____ Individual Opera Box Seats (@ \$50 each
Only 24 Box Seats available. Includes ticket to pre-party.

_____ Orchestra Seats @ \$30 each

_____ House Seats @ \$20 each

_____ Mezzanine @ \$15 each

_____ Pre-party @ \$25 each

Bar & Grill

Pre-Party

6:30 to 7:30 p.m. at the
Paramount Theatre,
Mezzanine level.
\$25 per ticket. Drinks and
hors d'oeuvres will be served.

\$ _____ Total Amount

Please Note: To get the best seating available, please purchase your tickets early. Advance ticket orders must be submitted to the Austin Bar/AYLA office by Friday, October 27. Tickets will be mailed to you 10 days before the show. All seating is reserved on a first-come, first-served basis. On Monday, November 6, tickets will be open to the public and available for purchase at the Paramount Theatre box office, located at 710 Congress, or by STAR ticketing outlet Monday through Friday, 10 am to 4 pm and Saturday 10 am to 5 pm; or tickets can be charged by calling STAR at 469-7469.

Thank you for responding by Friday, October 27.

Please FILL in the following information and return this completed form, along with your payment, by October 27, to:

AYLA Foundation
ATTN: Bar & Grill
815 Congress Ave., Ste. 790
Austin, TX 78701-2665
Fax: 472-2720

For more information, contact
Debbie Kelly at 472-6279 or
debbie@auslinbar.org.

Contact Name _____ Title _____

Organization/Firm _____

Mailing Address _____ City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail Address _____

Payment

- ☐ My check/money order (made payable to AYLA Foundation) for \$ _____ is enclosed.
☐ Please charge my contribution of \$ _____ to my (circle one) Discover Visa MasterCard AmEx.

Card Number _____ Exp. Date _____ Signature _____

President's Message | Michelle Flowers Brooks

(continued from p.1)

important as I do.

If it wasn't for the excellent team working for CAPA, I would not be able to go home at night and dedicate the evening to "family time!" Each and every day I am amazed at how much the volunteers of CAPA give to the organization. I know that I can always count on the "team" to take care of business. This means that I go home each night with security and peace of mind, knowing that the matters within CAPA are being handled and that I am not having to stress making sure nothing is falling through the cracks.

The fact that CAPA has this strong support also means that most of the volunteers are able to take care of CAPA business during business hours and then "turn it off for the day." This is such a necessity! Without this, the team we have would burn out quickly and CAPA would falter. Please do your part to help ensure that CAPA maintains this level of support. No one is asking anyone to do it all alone! We are all here to help and support each other. Why not be a part of that foundation and enjoy the many rewards it has to offer?!?

October Birthdays!



10/1	Jennifer Gunter	10/15	Holly Gove
10/03	Joyce Goodman	10/15	Vanessa Ray
10/6	Mary Alford	10/18	Kathryn Betros May
10/6	Marianella (Nella) Joseph	10/18	Pat Seward
10/7	Janice Palacios	10/22	Elizabeth Hall
10/7	Beth Watkins	10/27	Gaynell Doehne
10/8	Mollie Fohn	10/27	Virginia O. Gonzalez
10/11	Teresa Shock	10/27	Judith (Judy) Morgan
10/12	Alice Lineberry	10/31	Cheryl Jung

Happy Birthday!



CAPITAL AREA PARALEGAL ASSOCIATION

An Affiliate of the National Association of Legal Assistants, Inc.

MINUTES OF THE AUGUST 10, 2006 BOARD MEETING

Location: Holiday Inn
1-35 at Town Lake
Austin, Texas

The meeting was called to order at 12:20 p.m. by President, Michele Flowers Brooks. Board members in attendance were: Michele Flowers Brooks, President; Pam Hurn, President-Elect; Alice Lineberry, Secretary; Andrea Ontiveros, Treasurer; Betsy Boyd, Parliamentarian. Also present were: Vanessa Petrea, Lincite Edwards, and Cairo Dubois.

BUSINESS

Discussion was held regarding the need for Pam Hurn to register with NALA. Pam will check with her firm; she believes that they will pay for her membership.

Minutes. Motion was made by Pam Hurn to pass the Minutes of the July 13, 2006, Board Meeting and the Minutes of Board Actions – July 14 – August 3, 2006. Motion was seconded by Andrea Ontiveros. Motion passed, and minutes were approved.

Treasurer's Report. The treasurer's report will be circulated by email.

Motion was made by Andrea Ontiveros and seconded by Betsy Boyd to approve the purchase of two \$50 Target gift cards to be given as door prizes at TAPS. Michele will purchase the cards and give them to Cairo Dubois.

Membership. Member count is 230, with 37 sustaining members.

CLE. CLE Study group to meet on August 21st. A location is still needed to conduct the CLE Study Group meetings. Vanessa Petrea indicated that her office should be able to host the meetings. Motion was made by Betsy Boyd and seconded by Alice Lineberry for CAPA to pay for a two-night hotel stay for member(s) who attend the majority of the study group meetings and intend to sit for the exam, so long as the members are in the same city. CAPA will make the arrangements for the hotel. Vanessa Petrea agreed to look into arrangements at the appropriate time.

Brown Bag Seminar. Discussion held and it was agreed that the name should change if event is being sponsored by a vendor and the vendor is providing lunch since "brown bag" would indicate that individual is to bring his or her own lunch.

Community Services. Clean Up still scheduled for August 26th. Betsy Boyt and Andrea Ontiveros thought they would be able to attend.

Job Bank. There have been 11 new job postings since the last board meeting.

Mentor Program. A notice was sent to ACC and Virginia College.

Public Relations. Motion was made by Andrea Ontiveros and seconded by Alice Lineberry to approve the purchase of 500 3M highlighters at a cost of \$1,095 to be given to students when presentations made. Vanessa Petrea indicated that she was going to try to get a new CAPA benefits banner made by one of our vendors.

Social Events. Discussion was held regarding date of Paralegal Day Social. Decision was made to keep on actual date of event, Monday, October 23. The Paralegal Day Social is to be supported by vendors.

Discussion was held regarding Christmas Party being paid fully by CAPA and not supported by vendors. Motion was made by Alice Lineberry and seconded by Betsy Boyt to have the Christmas Party paid solely by CAPA at a cost not to exceed \$3,000 and to not allow the vendors to work during the party.

VLS. Discussion was held regarding CAPA's sponsorship of the Bar & Grill event. It was moved by Betsy Boyt and seconded by Andrea Ontiveros to make a straight donation to VLS in the amount of \$250.

New Business:

Women's Advocacy Gala. Discussion was held regarding attendance at the Gala. Vanessa Petrea indicated that she might want to attend. Unused tickets will be made available to members.

New Salary Survey. Motion was made by Betsy Boyt and seconded by Andrea Ontiveros to do an on-line salary survey at a cost of \$60.

There being no further business to discuss this meeting was adjourned at 1:17 p.m.

Respectfully submitted,


Alice Lineberry, PLS, CP



CAPITAL AREA PARALEGAL ASSOCIATION

An Affiliate of the National Association of Legal Assistants, Inc.

MINUTES OF BOARD ACTIONS --AUGUST 10, 2006 -- SEPTEMBER 5, 2006

The following motions were made, seconded, and passed by the Board of Directors:

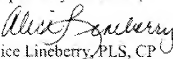
Motion made on August 10, 2006, by Alice Lineberry to approve the July 2006 treasurer's reports. Motion was seconded by Betsy Boyt. Motion passed.

Motion made on August 29, 2006, by Betsy Boyt to approve the contract for Iron Cactus in order to have the CAPA Day Celebration at that location. Motion was seconded by Alice Lineberry. Motion passed.

Motion made on August 30, 2006, by Andrea Ontiveros to approve Dora Hudgins' purchase of Microsoft Publisher 2003. Motion seconded by Betsy Boyt. Motion passed.

Motion was made on September 5, 2006, by Alice Lineberry to allow jobs posted with CAPA to also be posted with LAT as long as the employer has been consulted and has agreed to such posting. Motion was seconded by Andrea Ontiveros. Motion passed.

Respectfully submitted,


Alice Lineberry, PLS, CP

Treasurer's Report— August 2006

7:07 AM
09/13/2006
Account Basis

Capital Area Paralegal Association Profit & Loss Detail August 2006

	Date	Num	Name	Memo	Amount
Income					
Income					
400 - Unrestricted Net Asset-Support					
		403 - Dues	403 - Dues		
	06/03/2006		Linda Socha	Student Membership	22.50
	06/03/2006	1001	Kathryn Bernas May	Student Membership	35.00
	06/03/2006	2442	Germer Gertz LLP	Student Membership - CP	35.00
	06/03/2006	5139	Scarb Digital Imaging	Annual Membership	50.00
	06/03/2006	2010	Catherine Blackwell	Renewal Membership	50.00
	06/03/2006	2446	T & M Document Services, Inc.	Renewal	75.00
	06/03/2006	1048	Shady Rains	Student Membership	22.50
Total 403 - Dues					<u>325.00</u>
460 - Sales of Merchandise					
	06/03/2006	6065	Patricia Seward	Hametag	5.50
	06/03/2006	2642	Twyla Grace	Hametag	5.50
	06/03/2006	667	Cheryl Fisher	Hametag	5.50
	06/03/2006	1893	Judith Meininger	Hametag	5.50
Total 460 - Sales of Merchandise					<u>22.00</u>
479 - Advertising					
	06/03/2006	10402	LegalPartners, LP	Advertising	480.00
Total 479 - Advertising					<u>480.00</u>
Total 400 - Unrestricted Net Asset-Support					<u>827.00</u>
408 - Temporarily Restr. Net Assets					
411 - Program Service					
	06/03/2006		Members	Name Tags - July Luncheon	75.00
	06/03/2006	2443	Germer Gertz LLP	July Luncheon	42.00
	06/03/2006	6770	Gay Lavallee	July Luncheon	15.00
	06/03/2006	20043	Wilson Grossenfelder	July Luncheon	15.00
	06/03/2006	14895	Adam Goldstein & Shuffield	July Luncheon	15.00
	06/03/2006	8618	Cooley Gott	July Luncheon	30.00
	06/03/2006	6207	Baminger Legal	July Luncheon	30.00
	06/03/2006	1016	Kathryn Morley	July Luncheon	15.00
	06/03/2006	21059	Deleon Soggins	July Luncheon	15.00
	06/03/2006	1339247	Haynes and Boone, LLP	July Luncheon	45.00
	06/03/2006	8924	Outlook Bryant, Campbell & Schwarz	July Luncheon	30.00
	06/03/2006	2419	Luis Fernando Pina	July Luncheon	45.00
	06/03/2006	1001	Andrea R. Cifuentes	July Luncheon	15.00
	06/03/2006	14915	Whitehurst-Harkness	July Luncheon	47.00

Treasurer's Report— August 2006 (cont.)

Date	Num	Name	Memo	Amount
08/03/2006	10387	Texas Star Document Services	July Luncheon	30.00
08/03/2006	7600	The Exhibit Company	July Luncheon	15.00
08/03/2006	1833	Litigation Resources, Inc.	July Luncheon	15.00
08/03/2006	2464	Judy Morgan	July Luncheon	15.00
08/03/2006	3421	Scott Sokol	July Luncheon	15.00
08/03/2006	3774	Ch. Guillelson	July Luncheon	15.00
08/03/2006	3166	Ref Putnam Kraft	July Luncheon	30.00
08/03/2006	67971	Sunbelt Reporting & Litigation Serv	July Luncheon	15.00
08/03/2006	5066	Scarab Digital Imagin	July Luncheon	10.00
08/03/2006	7624	Attorney Resource	July Luncheon	30.00
08/03/2006	480571	Wilson Sorrell	July Luncheon	15.00
08/03/2006	3184	Lloyd, Gosselink et al	July Luncheon	135.00
08/03/2006	18864	Jenkins & Gilchrist	July Luncheon	45.00
08/03/2006	2255	Digital Discovery Solutions	July Luncheon	10.00
08/03/2006	2221	Elizabeth Bordenave	July Luncheon	15.00
08/03/2006	582724	DLA Piper Rudnick	July Luncheon	60.00
08/03/2006	44130	Jackson Walker	July Luncheon	45.00
08/03/2006	2413	E. J. Boyl	July Luncheon	20.00
08/03/2006	2673	Law Offices of Price Ainsworth	July Luncheon	30.00
08/03/2006	79593	Clark Thomas	July Luncheon	15.00
08/03/2006	12059	Crampton & Associates	July Luncheon	15.00
08/03/2006	7248	Adam Rosenblatt	July Luncheon	15.00
08/03/2006	1455	Debra Harter	July Luncheon	15.00
Total 411 - Program Service				1,116.00
Total 458 - Temporarily Restr. Net Assets				1,116.00
Total Income				1,943.00
Total Income				1,943.00
Expense				
506 - Answering Service				
08/01/2006	2964	Voice Text Interact. (Iv). Inc.	84987 - August Invoice	15.16
Total 506 - Answering Service				15.16
508 - Bank Service Charges				
08/30/2006	EFT	Return Check Fee	NSF Fee for Check No. 66	15.00
Total 508 - Bank Service Charges				15.00
525 - Gifts				
08/14/2006	VISA	Target	TAPS - Door prize	100.00
Total 525 - Gifts				100.00
530 - Seminar				
08/01/2006	2865	CAPA	CAPA Leadership Workshop	90.00
08/04/2006	VISA	Southwest Airlines - Dallas CAPA Ser	CAPA Leadership Confer	174.10
08/04/2006	VISA	Southwest Airlines - Dallas CAPA Ser	CAPA Leadership Confer	174.10

Treasurer's Report— August 2006 (cont.)

Date	Num	Name	Memo	Amount
08/04/2006	VGA	Southwest Airlines - Dallas DAPA	Sen DAPA Leadership Confer	174.00
Total 630 - Seminar				612.00
545 - Meetings and Conventions				
08/30/2006	2970	Green Pastures	August Luncheon Cost	1,827.21
Total 545 - Meetings and Conventions				1,827.21
545.2 - Scholarship				
08/30/2006	2971	Dana Hudgins	Hotel/Travel Expenses No	100.00
08/30/2006	2972	Paralegal Division	TAPS Registration for Dana	205.00
Total 545.2 - Scholarship				305.00
550 - Merchandise Purchased				
08/01/2006	2967	Tyler Hum	Reimbursement Comput	39.17
08/17/2006	2969	Promotional Graffiti	Board Name Tags/ Invoice	0.00
Total 550 - Merchandise Purchased				39.17
560 - Postage				
560.1 - Refunds to Members				
08/03/2006	2968	Members	Treasurer Postage Reimbi	5.40
Total 560.1 - Refunds to Members				5.40
Total 560 - Postage				5.40
561 - Postal Box Rental				
08/17/2006	2970	United States Postal Service	Post Office Box For the fe	40.00
Total 561 - Postal Box Rental				40.00
568 - Program				
568.2 - Refund to Members				
08/01/2006	2966	Judy Morgan	Reimbursement for lunch	46.49
08/30/2006	2974	Patty McKay	Reimbursement for the pr	0.00
08/30/2006	2975	Patty McKay	Reimbursement for the pr	48.69
Total 568.2 - Refund to Members				95.18
Total 568 - Program				95.18
569 - Speaker/officer/board gifts				
08/03/2006	2963	Thelma Alvarado-Garza	Reimbursement - Gift/Gift	490.46
Total 569 - Speaker/officer/board gifts				490.46
700 - Website				
08/10/2006	EFT	Webzero Internet	September ISP Charge	14.95
Total 700 - Website				14.95
Total Expense				3,559.83
Total Expense				3,559.83

Treasurer's Report— August 2006 (cont.)

11:44 PM
09/12/2006

Capital Area Paralegal Association
Statement of Cash Flows
August 2006

	Aug 06
OPERATING ACTIVITIES	
Net Income	-1,731.52
Net cash provided by Operating Activities	-1,731.52
Net cash increase for period	-1,731.52
Cash at beginning of period	22,605.78
Cash at end of period	<u>20,874.26</u>

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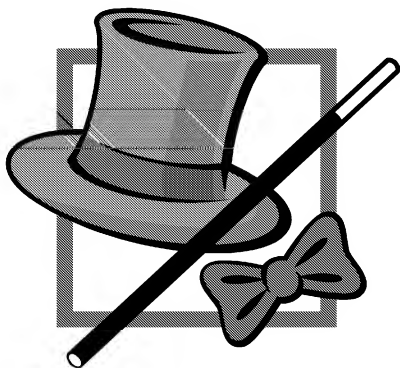


TEXAS ADVANCED PARALEGAL SEMINAR

*A Three-Day Multi-Track CLE Seminar Sponsored by
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September 20-22, 2006
Addison, Texas

WE'RE PUTTING ON THE RITZ FOR TAPS 2006!



*Celebrating the Paralegal Division's
25th Anniversary*



Texas Advanced Paralegal Seminar

***Celebrating the Paralegal Division's 25th Anniversary
"Putting on the Ritz"***

(A CAPA Member's View)

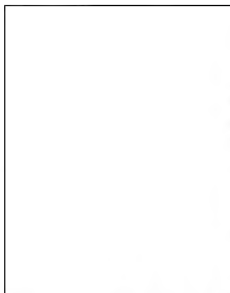
The Social on Wednesday night was a beautiful celebration of the Paralegal Division's 25th anniversary. Four buses took attendees to the Delaney Vineyards in Grapevine, Texas. The remaining daylight allowed anyone who was interested to take a self tour of the 10-acre vineyard. Delaney also has a 100-acre vineyard in Lamesa, Texas. They grow 7 varieties of grapes between the two locations, and they have several award-winning wines available for sale. The celebration kicked off with a wine tasting and the entertainment of Bruce Kleinberg and his Dueling Pianos. A wonderful dinner buffet was prepared and served by Guess Who's Coming to Dinner. The food was wonderful, and the dessert bar was a chocolate fountain with fruit and cookies to dip. Prizes were awarded for the most elegant, most creative and most theme appropriate outfits of black and silver. A champagne toast topped off the evening, and anniversary gifts (silver julep cups with floral arrangements) were enjoyed by all.

The Social on Thursday night was held in the hotel. Comedy Sportz, a comedy improv troupe entertained everyone with comedy improvisation, using "volunteers" from the audience. There were 3 food bars - tacos, soups and baked potatoes. Many door prizes were awarded, including two \$50 gift cards donated by CAPA. To top off the evening two large sheet cakes with candles glowing to celebrate PD's 25th anniversary, were wheeled out for everyone to enjoy.

Three days of classes with 5 tracks of topics were offered - something for everyone. The luncheon on Friday was the final celebration of PD's anniversary. Joe Shannon, Assistant District Attorney for Tarrant County, gave a very informative speech on Identity Theft - a real eye-opener for everyone. Again, many door prizes were awarded and a Grand Prize of \$2,500 was awarded to the lucky person whose name was drawn from all the completed vendor exhibit cards. The exhibit hall had over 40 vendors sharing information regarding the services they provide to help us do our jobs more efficiently. All in all, it was a ***fabulous*** 2006 TAPS seminar and a great way to get our CLE!

Baro DuBois

Nancy McLaughlin Scholarship Fund Winner Announced



Nancy Carmen McLaughlin, CLAS, TPS was a legal assistant at the Law Offices of William Schmidt for twelve years prior to her sudden death on Friday, December 8, 2000. She was dedicated, hard working, and attentive to the needs of clients and her employer.

Many remember Nancy as a very active member of the Capital Area Paralegal Association ("CAPA") and the Legal Assistant Division of the State Bar of Texas, now known as the Paralegal Division ("Division"). She spent many hours volunteering for both organizations and motivating others to become involved themselves. She served in many capacities, most notably as Programs Chair and President of CAPA, and as Editor of the Texas Paralegal Journal, published by the Division.

Nancy touched the lives of many people and often you will hear them say they thought of her as family. She was an animal lover and left behind four dogs and a cat. She was a kind and generous friend and devoted her free time to animal causes, Meals on Wheels, and those in need. She is still missed sorely by her many friends.

To honor Nancy, CAPA has awarded a scholarship to Dora Hudgins, another prominent member of CAPA. Please congratulate Dora the next time you see her. The next two pages contain her submitted paper - "Why I Chose To Become a Paralegal."

- The Nancy McLaughlin Scholarship Committee

WHY I CHOSE TO BECOME A PARALEGAL

By Dora Hudgins, CPLS, CP

As I was growing up in rural Indiana, I always knew that I wanted to be a part of a profession where I could help others. First I thought I wanted to become a nurse; however, after seeing an accident one evening and seeing the small amount of blood that was on another little girl's arm, I decided that probably wasn't an ideal job for me. Next I thought becoming a teacher would be a good profession. My plans were to become an elementary education teacher. When I was in high school and began taking business courses, I realized that I was very good in bookkeeping, typing, shorthand, and office studies. I joined the Future Teachers of America and soon realized that there are many students who couldn't afford to go to college and needed some vocational training in high school which would allow them to go out into the work force immediately after high school and find decent jobs. Many of the local people drove to Indianapolis and worked in the state offices and most of them did not have a college education. I decided that I would rather focus on high school business education and help those students who needed vocational training. After graduation, I began college and was studying music, business economics and general studies. My plans were definitely to go into high school business education.

It's funny how sometimes life throws little obstacles in your way that changes everything - like meeting the man of your dreams. It was 1970 and the Vietnam War was in full swing. He had just received his draft papers and was headed off to who knows where and maybe never to be seen again! College no longer seemed to be a priority and becoming a

teacher was taken over by becoming a wife and a mother.

Time goes on - it was 1980. I had been married, divorced, was raising two children, with another one on the way, and had just moved to Austin Texas. Needless to say, I never made it back to college and I had not taken any further educational training. I had retained those good secretarial skills from high school business courses and by relying on those skills I had worked in various office clerical positions over the past 10 years. As soon as my third child was born I went to work for Manpower in downtown Austin. My first assignment was to be in an attorney's office. They had evidently sent others employees to this law office but they were just as quickly sent home. I explained to the recruiter that I had no legal experience and was told that the attorney didn't care about that - he just wanted someone who could type fast. So off I went. When I walked into the lobby of the law office, I was escorted back to a secretarial area. I was astounded at all the files that were stacked up and the attorney was not too happy because his work was not getting done. I began looking into the files and it all seemed very interesting. I started asking questions and was told that I just needed to type what was on the paper and get it all done as quickly as possible. The more I typed the more fascinated I became with the terminology, the procedures, and all the rules and instructions I was given to learn. AND the new equipment that had just been purchased was better than anything I had ever seen. Of course, the attorney told me not to worry about working the new equipment - just type

WHY I CHOSE TO BECOME A PARALEGAL (CONT.)

whatever I could by using the selectric typewriter. I was so intrigued with it all that I took the manual home to the new equipment and quickly figured out that the work could get done much faster if I tried using it. The next day I fired up the newly purchased Burrough's word processing equipment and started pumping out more work. When the attorney first came in and saw I was using the equipment he was not pleased at all; however, when I told him that I'd read the manual last night and I knew that I could get the work done faster, his response was, "If you have any problems, just get back to that typewriter and get the work out." The eldest attorney asked me to come into his office. He told me that they were impressed with my skills and asked if I would be willing to take a full time permanent position working for them if they would be willing to train me on the legal part of the job. Six years later I was still working there!

I became very fascinated with the law and decided that I wanted to learn more. My first step was to join the Austin Legal Secretaries Association. I attended the continuing legal education courses, the local meetings, the state meetings and became very involved. I eventually studied for and passed the Professional Legal Secretaries exam. I still wanted to learn more. I knew that I couldn't afford to go to school, raise three children and still work full time so I attended a paralegal course that was offered at Huston-Tillotson College in 1989. The course was offered on weekends which was the only time I was free anyway. After completing the course and obtaining a Certificate of Completion, I joined and became very involved in the Capital Area Paralegal Association. CAPA offered a study group which I attended and started studying for the National Certified Legal Assistant exam. In 1993 I passed the exam and became a Certified Paralegal.

I truly believe in professional associations and what they can do to help you achieve your dreams. Working in the legal field can be very demanding and there are constant changes. But it is also very rewarding. Without attending continuing education seminars and staying on top of all the new rules, you cannot effectively do your job. You must be constantly in the know. And how better to know, than to attend the monthly luncheons offered by CAPA and attend the seminars offered by the Paralegal Division of the State Bar. I don't want to be just another paralegal - I want to be the best paralegal. And the best requires that you stay on top of all the new rules, regulations, practices, equipment, software, e-filing - whatever is out there on the horizon.

You know, life may throw those little obstacles in your way - but it is how you deal with those obstacles that makes you fail or succeed. I may not be where I am today by following the "traditional" road, but I have worked hard and have given my all to become the best I can be. I love being a paralegal and cannot imagine doing anything else with my life. I love the feeling that I can help others by helping them understand their rights and help them wade their way through the intricate legal system. I love standing beside an attorney and the client in the courtroom knowing that we are prepared, everything is indexed, documents marked properly and filed, notebooks in order, and the client feels comfortable and knows that we believe in him and are doing the best we can for him.

I may have become a part of the legal field by default - BUT I have stayed in the legal field because I want to be a part of this wonderful legal system and I want to continue to learn more, help others and be the best paralegal I can be.

Electronic Evidence And The Large Document Case: Common Evidence Problems Discovery For A New Millennium

By Robert L. Levy and Patricia L. Casey, Haynes and Boone, LLP

(This article is an excerpt from a comprehensive treatment of the topic of Electronic Discovery.)

The full article is available at <http://www.haynesboone.com> in the Knowledge Connect section, in Publications.)

I. The Challenge Of Electronic Evidence

Computer usage now provides all elements of society. Most business and many individuals conduct a significant percentage of communications through electronic media. E-mail, facilitated by the Internet, has become the dominant form of intra-office and inter-office communication. Businesses are also managed in a wide variety of electronic formats, including spreadsheet programs, databases and computer-aided design tools. The proliferation of computers and other electronic forms of communication (such as PDA devices and wireless two-way e-mail), exponentially increases the volume of electronic information.¹ Electronic mail exchanges have replaced telephone calls.

This increase in the use of computers creates a number of challenges for litigators, including the collection, management and introduction of electronic evidence. More than five years ago, the Manual for Complex Litigation reached this conclusion, citing that "telecommunications have become omnipresent in litigation."² A typical production of documents that 35 years ago might have involved less than 1,500 pages of documents can now involve 10,000 or more, and may include information contained in electronic formats that are not readily convertible to paper. More complicated cases can sometimes involve millions of pages of information.

This paper explores issues particular to electronic evidence and discusses related challenges pertaining to the large document case that is often the offspring of electronic document litigation, including production of electronic data and managing the data in litigation.

II. The New Age Of Electronic Production

The world of electronic evidence has transformed the litigation landscape, creating new opportunities and potent dangers. A recent decision by a Magistrate Judge in the Northern District of Ohio is illustrative of the challenge. In the combined case, *In Re Telecor Corporation Securities Litigation and Haynes v. PrivatwaterhouseCoopers, LLP*,³ Magistrate Judge Patricia Brennan recommended to the district court that it enter a default judgment in the case against

PrivatwaterhouseCoopers that could result in actual damages in excess of \$199,000,000.⁴ The Magistrate Judge, in a 75 page recommendation, found that PWC engaged in discovery abuse. This finding was largely based on PWC's failure to produce electronic records, including different copies of a database that had been produced in paper form. The Magistrate Judge found that PWC had slightly different copies of the same database application used to manage audits. One copy was retrieved via the network and another copy came from a laptop. Mistaken on the different versions varied. Although not the only basis for the proposed finding, the failure to completely produce all electronic records was a key element to the recommendation. The proposed ruling is currently pending before the District Court.

The proliferation and importance of electronic evidence requires consideration of the unique challenges raised by this medium. Electronic mail communications are often fertile grounds for case dispositive type evidence.⁵ Cases can turn on a single e-mail or the ability to demonstrate how a variation in a format in a spreadsheet could result in an entirely different conclusion by an expert witness.⁶

E-mail is an efficient means of business communication, but it also involves risks and potential liability for any company. "Like ghosts from the past, these forgotten electronic bits can come back to haunt a litigant, since computer data does not subject to usual discovery requests."⁷ E-mail is inherently susceptible to revealing "smoking gun" evidence for subtle characteristics, particularly ease of use and informality, lead to the "incriminating" of information that normally would never be written down or distributed in an official memo. For example, an e-mail message in a case discovered as an e-mail message from the company president to the head of personnel stating, "Get rid of that idiot."⁸

Employee perceptions of internal e-mail as informal often results in casual comments to which others may attach unintended meanings. E-mails have

¹ Jonathan Glick, *Judge Finds Privatwaterhouse: Richard Davis*, N.Y. Times, January 13, 2003.

² Michael J. Parker, *E-Data: How It's Changing The Game*, Nat'l. L.J., Oct. 28, 1999, at 13.

³ Judge recommendation note that is now case file 02-cv-00001 (Haynes v. PrivatwaterhouseCoopers) in the Northern District of Ohio, filed Jan. 24, 2003. Also see *Haynes v. PrivatwaterhouseCoopers*, 2003 WL 102734 (N.D. Ohio July 16, 2004).

⁴ Matthew Goldstein, *Electronic Mail: Computer Algorithms Produce Surprising Results*, 2003 WL 102734 (N.D. Ohio July 16, 2004).

⁵ Parker, *supra* note 2, at 13.

¹ Authorize outside that at least one-third of a business's data is its electronic format. See Gregory S. Johnson, *A Practitioner's Overview of Federal Discovery*, 31 Comp. & Bus. L. 399 (2002); see also David C. Hunsley, *Discovery of Electronic Data From Other Countries in Securities Matters*, 33 Comp. & Bus. L. 399 (2004).

² Matthew Goldstein, *Electronic Mail: Computer Algorithms Produce Surprising Results*, 2003 WL 102734 (N.D. Ohio July 16, 2004).

³ *In Re Telecor Corp. Sec. Litig.*, No. 02-cv-00001, 2003 WL 102734 (N.D. Ohio July 16, 2004).

Electronic Discovery (Cont.)

been the focus of high profile litigation, most particular *United States v. Microsoft*⁹, in which Bill Gates' testimony in depositions was contradicted by his e-mail exchanges.¹⁰

E-mail messages are just one example. A growing number of records, including invoices and accounting data, are available on computers. Multiple versions of word processing documents are available on computers. Individuals and companies routinely capture information as spreadsheets on computers. In other words, in addition to the discovery of paper documents, counsel must seek discovery of electronic data or risk missing critical information.¹¹ A non-exhaustive list of documents that might be requested includes: customer lists, financial records, purchase and sales orders, personnel files, original documents such as letters, memoranda, invoices, and design specifications; drafts of original documents such as letters or memos; databases used by individuals or local area networks; computer programs evidencing a particular process; incorporating specific information, or demonstrating the use of proprietary technologies; computer operations logs containing usage information; logs and text of electronic messages or e-mail, including "bounced" or deleted messages, message drafts, or mailing lists; electronic messaging records for messages within a specific company's network or across a wider network, such as the Internet; manufacturer's specifications for the computer, access codes for computer programs; voice mail transcriptions; and scheduling systems.¹²

III. Discovery Of Electronic Information - Request And Response

The first electronic evidence problem an attorney faces is how to collect electronic evidence. In addition to the more common problems faced by attorneys coming through warehouses of stored records, counsel is now turning on electronic data must become familiar with the mechanics of the recovery and reconstruction of such data. This includes a basic understanding of the terminology used by computer

forensics experts, some technical knowledge of data formats and signals, and familiarity with the methods used to recover and reconstruct electronic data. Many lawyers are unfamiliar with technological issues that may arise. Today's lawyer must be ready to address these issues. At a minimum, the practitioner can assist business clients by advising them to gain control of their computer information and to implement information retention and e-mail policies.

A helpful resource for managing electronic evidence has been developed by the Barona Conference, a leading group of industry professionals (including attorneys, litigation support professionals and vendors) who meet regularly to explore issues in electronic discovery and recommend guidelines, rule changes, and methods to manage electronic information.¹³ The Conference has developed a particularly helpful guide titled *THE BARONA GUIDELINES Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*.¹⁴

A. The Right to Production of Computer Records

Discovery rules now address the production of electronic data, though the rules have yet to address many of the particular nuances involving electronic media. Under Texas Rule of Civil Procedure 196.4, for example, litigants are required to produce electronic data that is "reasonably available," if requested.¹⁵ Where the responding party demonstrates that the data cannot be produced through reasonable efforts, Rule 196.4 requires the requesting party to reimburse the cost of production.¹⁶ Where the court finds that the production of information without an accompanying computer analysis would result in unfair hardship or burden on the responding party, the court can require the producing party to make use of its computer system to generate the requested information. Thus, cost can be a

⁹ *United States v. Microsoft*, 97 F. Supp. 3d 40 (D.D.C. 2000), rev'd in part and aff'd in part, 253 F.3d 34 (D.C. Cir. 2000), cert. denied, 530 U.S. 1023 (2001).

¹⁰ *Id.* (citing Amy Shuman, *Microsoft's Hidden Flip Side: Ego Checkpoint*, *Crave Legal Commentary, Crave Electronic Advances*, Inc. Website Blog, Nov. 14, 2000).

¹¹ John H. Brown & Kenneth R. Brown, *Managing Risk Due to Electronic Data in Your Discovery*, *Litig. Tech. J.* 40, 40-41, at 42.

¹² Jean Marie B. Perkins, *Electronic Records and Documents in Discovery: The Place for Your Computer's "Other Children"*, *The Computer Law & Electronic Record Keeping (CER) L.J.*, June 27, 1994, at 28.

¹³ *The Barona Conference*, at www.thebaronaconference.org (last visited Oct. 14, 2003).

¹⁴ *The Barona Conference, The Barona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, at http://www.thebaronaconference.org/resources/Book7039_05.pdf (last visited Oct. 14, 2003).

¹⁵ Tex. R. Civ. P. 196.4 (Electronic or Magnetic Media).

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the responding party must produce it. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business.

¹⁶ *Id.* Rule 196.4 requires the producing party to reimburse the cost of production where a finding of good cause. Tex. R. Civ. P. 196.4(b) states that 196.4 does not require an explicit finding of good cause. Tex. R. Civ. P. 196.4.

Electronic Discovery (Cont.)

significant consideration.¹⁷ In addition to the cost of production, a litigant must consider the cost of reviewing and evaluating electronic data and getting it into a format that will be useful and, in many cases, admissible at trial.

The basic rules of discovery apply to the computer-generated storage of data and information that may be offered as evidence at a civil trial. For the most part, issues concerning the scope of pretrial discovery of computer evidence have been left to the trial courts to resolve according to established rules of procedure and evidence.¹⁸

The Federal Rules of Civil Procedure permit the discovery of relevant computer-generated evidence. The 1996 revisions to the Rules require parties to disclose the description and location of relevant data compilations early in the litigation, before discovery requests are submitted.¹⁹ Unlike the Texas Rules, however, the current version of the Federal Rules does not specifically address procedures and costs associated with the production of electronic evidence. As a result of a series of rulings in Federal Courts (including the *Shufeldt* case mentioned below), the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has adopted amendments to Federal Rules 26 and 37 dealing with electronic discovery issues (reviewed below).

The current Federal Rules authorize the production of "designated documents" including "data compilations," which clearly include electronic computer data.²⁰ According to the Advisory Committee Notes, the burden is on the responding party to produce the data in a readable form, which typically means a computer printout. The trial court also has discretion to compel the disclosure of the source code when necessary to verify the authenticity and accuracy of the data.²¹ At the same time, in some states, where no adequate rules of documents exist except in an opposing party's litigation support system, the court will not compel that party to use its litigation support system for the benefit of an adverse party.²² Therefore, a party can be compelled to produce relevant documents, but may not be required to sort or analyze the data²³—it is

the nature of what is being produced that governs.²⁴ Production of electronic data will also be allowed where it forms the basis of an expert's testimony for effective cross-examination purposes. This occurs in *Cleveland v. Cleveland Electric Hardware Co.*,²⁵ observed that any use of computerized data presents some obstacle to effective cross-examination because of the difficulty of knowing the precise methods employed in programming the computer, as well as the effectiveness of the persons responsible for feeding data into the computer. In that case, Defendant compelled pretrial production of data and calculations from computer simulations underlying the conclusions contained in the report of certain plaintiff's experts. The court granted the motion to compel production of computerized data relied upon by the expert because that kind of evidence is essential for effective cross-examination.

On April 12, 2006, the United States Supreme Court approved, without comment or dissent, proposed amendments to the Federal Rules of Civil Procedure.²⁶ The Amendments have been transmitted to Congress and unless Congress enacts legislation to reject, modify, or defer the amendments, a move unlikely to occur²⁷, the amendments will take effect December 1, 2006.²⁸ The new Federal Rules officially incorporate electronic documents in the discovery process and better appreciate the special problems associated with managing massive volumes of electronic information.

Rules 16 and 36 will explicitly incorporate electronic discovery into pre-trial scheduling and planning. Rules 16(b)(5) and (6) will allow the court to include in scheduling orders provisions for disclosure or discovery of electronic information and agreements reached by the parties regarding the assertion of claims of privilege or protection of trial preparation materials after production.²⁹ Rules 26(b)(3) and (4) will require that parties disclose relevant electronic discovery unless when they confer pursuant to the Rule.³⁰ One commentator characterized the changes as relatively

¹⁷ 41 Am. Bar. Proc. & Prac. 16-1 *Discovery and Production of Electronic Mail in Actions* § 15 (2003).

¹⁸ 21 Am. Bar. Proc. 16-1 *Discovery of Computer Evidence* § 19 (2003).

¹⁹ Fed. R. Civ. P. 26(d).

²⁰ Fed. R. Civ. P. 34(b).

²¹ See C.F. Foster et al., *Computer-Generated Litigation Support Systems: The Documentality Issue*, 36 UMKC L. Rev. 649 (1998); see also *McIntyre v. Oetliker or Lutzmeier* (2005) § 2.74 (2005).

²² See, e.g., *Cal. Civ. Proc. Code* § 2067 (2005).

²³ *Shufeldt v. Aero*, 550 P.2d 616 (2d Cir. 1976), *cert. den.*, 437 U.S. 944 (1978).

²⁴ See, e.g., *Stanton v. Montgomery Ward & Co.*, 51 F.R.2d 138 (S.D. Ill. 1986) (examining employee records to test discrimination claim); *Davis v. Montgomery Ward*, 89 F.R.2d 180 (S.D. Cal. 1999) (examining 1961 flight card when details of defendant's program appear more relevant than books).

²⁵ *Cleveland v. Cleveland Elec. Hardware Co.*, 800 F. Supp. 1327 (N.D. Ohio 1998).

²⁶ U.S. Courts, <http://www.courts.gov/dockets/0606> (last visited June 21, 2006).

²⁷ See Mark Eisenstein, *New Discovery Rules Shift Focus on Information*, 39 Cal. L. Rev. 83 (2006) ("The proposed rules are widely expected to take effect on Dec. 1.")

²⁸ U.S. Courts, *supra* note 26.

²⁹ Fed. R. Civ. P. 16(b)(5), 26(b)(3) and (4).

³⁰ Fed. R. Civ. P. 16(b)(3), 26(b)(3) and (4) (effective Dec. 1, 2006).

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minor.³¹ However, another commentator noted that these amendments may complicate some cases: parties may waste time and money educating themselves about electronic discovery issues or may be forced to make significant discovery decisions early in the case.³²

Amended Rule 26(a)(1)(2) requires that parties provide the other side with copies of all electronically stored information that such parties plan to use at trial.³³ As well, Rules 33(d), 34(a) and (b), and 45 will allow for interrogatories,³⁴ requests for production,³⁵ and subpoenas³⁶ of electronically stored information. The language of Rule 34 was updated somewhat, but the original "data compilations" language was retained, notably, "electronically stored information" was added to the Rule's title alongside "documents."³⁷

Most significantly, however, the amendments impose limits on electronic discovery; the proposed amendments would limit access to electronic discovery that is not reasonably accessible and create a two step process for discovery. Specifically, amended Rule 36(b)(2)(B) states a responding party need not produce relevant, non-privileged electronic information if such party can show the information is not reasonably accessible because of undue burden or cost.³⁸ Thus, this Rule would put the burden on the responding party to identify the category of documents that are alleged to be inaccessible (including backup tapes). If the responding party meets this burden, the court may nonetheless order such discovery if the responding party shows good cause "considering the limitations under Rule 36(b)(2)(C)."³⁹

One commentator has criticized new Rule 26 as creating two loopholes for responding parties.⁴⁰ First, responding parties could re-characterize their data by saving it in inaccessible forms; the parties would thereby eliminate their production duty yet preserve the data for their own use.⁴¹ Second, the lofty, ambiguous "good faith" standard would allow responding parties to

unilaterally decide what information they will produce.⁴²

The new rules also include a safe harbor provision for companies that can show loss of data was the result of normal business practices.⁴³

Not surprisingly, the new Rules have stimulated substantial disagreement among litigators.⁴⁴ For example, some commentators believe that federal courts are better-equipped to make decisions regarding electronic discovery issues than the Rules Committee, that amendments to the discovery rules specifically addressing electronic discovery are unnecessary, and that imposing hard and fast rules on the dynamic principles of discovery is improper.⁴⁵ Other commentators, however, see the new Rules as a "red line step forward" and believe the rules will reduce litigation costs, eliminate judicial confusion, and create much-needed electronic discovery production standards.⁴⁶

1. Invasive Discovery of Electronic Evidence

Although the new rules will impact the scope of discovery, electronic data courts have long addressed what types of discovery will be allowed. Discovery of computer information can sometimes involve more invasive procedures. In *Playboy Enterprises v. Feltner*,⁴⁷ plaintiff sued defendant alleging that defendant operated an Internet web site that infringed and diluted plaintiff's trademarks. In its motion for discovery, plaintiff sought access to defendant's computer hard drive to recover deleted electronic mail. The court held that the defendant's hard drive was discoverable because it was likely that relevant information was stored there, and its production would not be unduly burdensome.

In contrast, the court in *Sutton Property Group L.P. v. Adelson, Inc.*,⁴⁸ refused plaintiff's motion to discover data deleted from defendant's file because hard copy files were already produced. The plaintiff alleged that the defendant infringed upon its trademark by creating a name and mascot for defendant's Internet business that

³¹ Kenneth J. Wilcock, *Electronically Stored Information: The December 2006 amendments to the Federal Rules of Civil Procedure*, 40 *Tex. A. & E. L.J.* 170, 186 (2006).

³² *Id.*, *supra* note 31, at 181.

³³ *See* R. Civ. P. 26(a)(1)(2) (effective Dec. 1, 2006).

³⁴ *See* R. Civ. P. 33(d) (effective Dec. 1, 2006).

³⁵ *See* R. Civ. P. 34(a) (effective Dec. 1, 2006).

³⁶ *See* R. Civ. P. 45 (effective Dec. 1, 2006).

³⁷ *Id.*, *supra* note 31, at 185.

³⁸ *See* R. Civ. P. 36(b)(2)(B) (effective Dec. 1, 2006).

³⁹ *Id.*

⁴⁰ Patrick B. Smith et al., *Comment: Riding the Inaccessible Horse: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 *Env. L.J.* 115, 125 (2006).

⁴¹ *Id.*

⁴² *Id.* at 182-83.

⁴³ *See* *id.* note 36(b) and accompanying text for a discussion about amended Rule 37's safe harbor provision.

⁴⁴ *See* e.g., Pamela A. McLean, *Electronic Discovery to Playboy Enterprises: Climb Over New Rule Hurdles First*, 33 *E. Discovery* 26 (2005), available at <http://www.law.com/legaltech/jsp/story.jsp?story=260505>.

⁴⁵ *See* *id.*, *supra* note 31, at 63-67.

⁴⁶ *See* *id.*, *supra* note 31, at 182.

⁴⁷ *Playboy Enters. v. Feltner*, 26 F. Supp. 2d 1040 (S.D. Cal. 1999), *rev'd*, 228 F.3d 959 (9th Cir. 2000), 237 F.3d 1039 (9th Cir. 2001), 260 F.3d 959, 960 (9th Cir. 2001), *cert. denied*, 533 U.S. 1031 (2001), 260 F.3d 959, 960 (9th Cir. 2001), 260 F.3d 959, 960 (9th Cir. 2001).

⁴⁸ *Sutton Prop. Group L.P. v. Adelson, Inc.*, 194 F.R.D. 699 (S.D. Ark. 2005).

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were similar to the plaintiff's registered trademarks. Thus, the plaintiff sought to compel production of the defendant's programming, computer files and access to defendant's computer for inspection. The court refused plaintiff access to this evidence as a reversal of its previous ruling that the plaintiff was entitled to recover the deleted files.

In *Alexander v. ZSI*,¹⁰ production of the back-up and archived e-mails and deleted or archived computer files was denied because it could not lead to discovery of any information responsive to the request for production.

In *James v. Greer*,¹¹ inmate plaintiffs sought access to various electronic databases maintained by the state correctional authorities in a suit that challenged the state's "double-clicking" program in its maximum-security prisons. During discovery, plaintiffs limited their requests to only four of the sixteen maximum-security prisons.¹² The state complied by providing the inmates with over 300,000 pages of documents.¹³ After nearly six years of litigation, the plaintiffs requested the production of defendant's electronic records and databases.¹⁴ The court analyzed whether the databases themselves were relevant and stated:

[I]f the database is question, which relates to the location of prisoners, the incidence of medical problems and pharmaceutical use . . . are generally relevant to the plaintiffs' inquiry. . . . At the same time, it is far from clear from the evidence presented that all of the information in the database sought goes to those issues.¹⁵

The court further considered that discovery of the databases would not only disclose the data, but also "the organizational framework of the databases," the disclosure of which would effectively expose "a great deal about the way that [the defendant] maintains, stores, and classifies information."¹⁶ The resulting issue is whether the way a party "maintains, stores, and classifies information" revealed through the discovery of a party's electronic database is relevant to the litigation for discovery purposes. The Southern District

of New York expressed concern over whether the discovery of an electronic database is relevant, but assumed the database was relevant for discovery purposes and ultimately decided the discoverability issue on other grounds.¹⁷

Although database architecture may be discoverable when it is relevant to the litigation, it may not be relevant when it is only requested for the purpose of transposing data contained in the database. Such discovery would provide the requesting party sensitive information about how the producing party organizes and stores data that is not relevant to the litigation.

In September 2005, a federal district court in Kansas held that a "party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact," absent an appropriate objection, an agreement between the parties to do otherwise, or a protective order.¹⁸ In this case, *Williams v. Sprint/United Management Co.*, the court ordered the defendant to produce responsive discovery, specifically email attachments, with the metadata intact.¹⁹ When the defendant pointed out to the court that no one had requested the production of the metadata separately,²⁰ the court stated that "[d]efendant should reasonably have been aware that the spreadsheet's metadata was incorporated within the Court's directive that it produce the electronic [documents] as they were maintained in the regular course of business."²¹

Similarly, in an unpublished opinion, a California appellate court required a responding party to produce a CD-ROM version of hard copy documents as the requesting party would have access to the metadata.²² The responding party argued it should not have been required to provide the CD-ROM at its expense because, in the ordinary course of business, its documents were not stored in CD-ROM format.²³ The

¹⁰ *Alexander v. ZSI*, 180 F.R.D. 111, 117 (D.D.C. 1998).

¹¹ *James v. Greer*, 354 F.3d 1029, 1030-31 (CA-10, 2005), *aff'd*, 553 U.S. 1039, 1040 (2007).

¹² A "double-clicking" occurs when two prisoners are housed in a cell originally designed for a single inmate. *Id.*

¹³ *Id.* at *2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at *2.

¹⁷ *Id.* The Court stated that even were "the databases would not be merely the passive vessel of providing the database. In order to make any statistical use of the data, the State would have to algorithmically develop and produce its plaintiff's experts the organization of a manual on how the data is created and organized." *Id.*

¹⁸ *Id.* at *3-4. The court went on to discuss the application of the burden test and determined that the burden of the defenses outweighed the potential benefit to the plaintiffs considering that the defendant had already produced the requested documents in hard copy, and would face an expensive burden of cost in providing plaintiff's expert with the materials necessary to utilize the database as a searchability tool. *Id.* at *10-11.

¹⁹ *Williams v. Sprint/United Management Co.*, No. CFS-05-00208-JWL/DKW, 2005 WL 3816256, at *31 (D. Kan. Sept. 29, 2005).

²⁰ *Id.* at 35. The defendant argued that because it originally producing the responsive documents in a format other than how they maintained them in the ordinary course of business held the metadata "lost" and *id.* at 13-16.

²¹ *Id.* at 13-16.

²² *Id.* at 13.

²³ *Global Compliance, Inc. v. Am. Antitr. Law Co.*, 350 F.3d 1013, 1017 (2005), *aff'd*, 357 F.3d 1027, 1028 (10th Cir. 2005), *cert. denied*, 556 U.S. 1039, 1040 (2007).

²⁴ *Id.* at *55.

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court stated, however, a CD-ROM is no more than a copy, similar to photocopying a paper document.⁶⁰

Another court went further, including alteration of metadata as actionable spoliation of evidence deserving of sanctions.⁶¹ In such cases, the court found the defendant had not only improperly deleted electronic evidence off of his laptop but had also tamperingly altered the embedded file's metadata after the defendant had received notice of plaintiff's claim against him and, later, an order from the court to turn over the laptop to the plaintiff.⁶² This court imposed sanctions because of both the deletion of files and the alteration of metadata.⁶³

2. Difficulty of Massive Electronic Discovery

Massive electronic discovery has its dangers, as the government discovered when it recently electronically filed an Opposition to a Motion to Quash a Grand Jury Subpoena in a San Francisco federal court; indeed, the government's apparent underestimation of metadata capabilities unveiled confidential details of a grand jury investigation.⁶⁴ About eight pages of confidential material regarding a grand jury investigation was stored in a handful of files electronically attached out in the government's bid.⁶⁵ However, the bid would be viewed by simply pasting the document into a word processing program. In so doing, nationwide news sources revealed the plight and the entire document was available to the public.⁶⁶ Thus, courts allowing massive electronic discovery must beware that it may reveal not only irrelevant but also confidential information.

3. The Burden Test Applied

Until the new Federal Rules are in play, courts will evaluate the burden of producing electronic evidence in determining whether and how to require production. In *Lorain v. A.P. Robins Co.*,⁶⁷ the plaintiff sought production of the defendant's backup tapes, and the defendant objected on the ground that restoring and searching through the back-up tapes would be extremely expensive. Rejecting defendant's argument, the Court stated that when a company makes the decision to install

itself of computer technology available to the business world, it takes the risk of the cost associated with production. Holding otherwise will lead to unfair results because litigants would be allowed to shield themselves from the expense while at same time reaping the business benefits of such technology.

In *Tabakatz v. USF Warburg LLC*,⁶⁸ (Tabakatz I), the plaintiff sought discovery of key evidence allegedly contained in various emails exchanged among USF employees.⁶⁹ USF argued that restoring those emails would cost \$675,000.00 exclusive of attorney's fees for reviewing the emails.⁷⁰

At the time of the alleged conduct, USF recognized the volume of email demanded an extensive backup system and it implemented preservation protocols; emails were preserved on backup tapes and optical disks.⁷¹ The court acknowledged that such backup tapes would take approximately five days to restore and recover the information.⁷² The optical disks were easier than the backup tapes to search using a program called *Turnlaweed*, which allowed the user to conduct a plain-language search and retrieve emails sent from a particular party or regarding a particular subject.⁷³

The *Tabakatz I* court went on to discuss the tension between the ability of a responding party to discover information that is relevant and not privileged, versus the burden and expense placed on the producing party especially in discovery disputes involving the recovery of electronic data.⁷⁴ However, electronic documents are

⁶⁰ *Tabakatz v. USF Warburg LLC*, 2007 F.R.D. 508, 514-15 (S.D.N.Y. 2006) (*Tabakatz I*).

⁶¹ *Id.* at 512.

⁶² *Id.* at 514.

⁶³ *Id.* concluding that although the use of an email reader would significantly reduce the amount of time it takes to restore a back-up set, the costs would be greatly reduced.

⁶⁴ *Id.* at 515.

⁶⁵ *Id.* at 516. The *Tabakatz I* court lists the eight factors established in *Rowe* that must be used to determine whether discovery costs outweigh the benefits: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party seeks the requested data; (5) the relative benefits to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its location to do so; and (8) the protective measures for each party. *Id.* (citing *Rowe* District Court in The Western Indiana Agency, Inc., 200 F.R.D. 481, 488 (S.D.N.Y. 2007)). The *Tabakatz I* court elaborated two of the factors as follows in *Rowe*: "the specificity of the discovery request" and "the purposes for which the responding party seeks the requested data." *Id.* at 519-22. The court went on to establish a new cost factor test including: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its location; (6) the importance of the discovery material to the litigation; and (7) the relative benefits to the parties obtaining the information. *Id.* at

⁶⁶ *Id.* at *54-55.

⁶⁷ *Rowe v. A.P. Robins Co.*, No. 06-cv-1900, 2006 WL 528828, at *6-11 (S.D.N.Y. May 8, 2006).

⁶⁸ *Id.* at *6-7.

⁶⁹ *Id.* at *9-11.

⁷⁰ *Adm. Litig., Electronic Stored Opns. W/Info Data Loss Costs*, N.Y. Times, Nov. 21, 2006, available at http://www.nytimes.com/2006/11/21/us/politics/21cost.html?_r=1&ref=/us/politics/21cost.html.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *James v. A.P. Robins Co.*, No. 97-2567, 1998 WL 463815, at *1 (S.D.N.Y. Sept. 28, 1998).

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no different from paper documents in that both are subject to destruction.¹³² Therefore, the presumption that the responding party must bear the expense of complying with requests for discovery is applicable to electronic documents, just as it is to paper documents.¹³⁴

The cost burden should only be shifted when electronic discovery imposes an "extra burden or expense" on the responding party.¹³⁵ The burden is shifted when it "outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."¹³⁶ The analysis does not turn on whether the information sought is electronic, but primarily on whether the information is kept in an accessible or inaccessible format.¹³⁷ "[I]n the world of electronic data, thanks to search engines, any data that is retained in a machine-readable format is typically accessible."¹³⁸

According to the court in *Zubulake I*, a three-step analysis is required when deciding disputes regarding the scope and cost of discovering electronic documents: (1) determine whether the electronic data is accessible or inaccessible given the nature of the responding party's computer system with respect to both active and stored data; (2) request that the responding party produce a small sample to determine what data may be found on inaccessible media; and (3) determine whether cost-shifting is appropriate.¹³⁹

The court in *Symantec Corporation v. Adolph Coors, Inc.*,¹⁴⁰ refused production of the electronic data sought because production would be unduly burdensome in volume.

Similarly, in *Fornell v. First Step Design*,¹⁴¹ the court denied the plaintiff's request to examine voluminous electronic documents because it was cumbersome and expensive. The plaintiff in this case requested additional discovery of the defendant's computer files in hope of finding evidence that a memo concerning the defendant's decision to terminate the plaintiff was fabricated. The court stated that the plaintiff's proposal failed to accurately describe the methodology of obtaining the data and failed to protect against destruction or disclosure of privileged information. These factors, combined with costs and increased attorney fees, led the court to rule that the benefit of discovery did not outweigh the costs and risk of production.

Furthermore, courts will consider other factors when determining which side should pay for production. In *Novor Entertainment, Inc. v. The Wallace-Morris Agency, Inc.*,¹⁴² the court held that since there had been no showing that the defendants accessed either their back-up tapes or their deleted e-mails in the normal course of business, this factor tipped in favor of shifting the costs of discovery to the plaintiffs. In *McFet v. Ashcroft*,¹⁴³ the court ordered limited efforts at recovery of deleted data in order to assess the inaccessibility of relevant information in light of the cost of such recovery and in order to determine the scope of further efforts.

Recently, in *Wigington v. CB Richard Ellis, Inc.*, an employment discrimination case, a federal court in the northern district of Illinois applied the *Zubulake I* factors, adding one additional factor: "[T]he importance of the requested discovery in resolving the issues of the litigation."¹⁴⁴ The plaintiff was seeking the costs it incurred in conducting discovery on defendant's e-mail backup tapes.¹⁴⁵ The "mechanical" factor, by the court's analysis, tends to volume one only that "[i]f relevance is in doubt, courts should err on the side of permissive discovery."¹⁴⁶ Inclusion of this factor in the balancing test nudged the scale in favor of cost-shifting.¹⁴⁷

Another court, though stating it was inclined to follow the *Zubulake* decision, set a different standard for cost-shifting with litigation holds: In *Kemper*

132. The first two factors are the most important of the seven factors and are weighted more heavily than the remaining five. *Id.* at 422-23.

133. *Id.* at 414-17 (quoting *Novor Entm't, Inc. v. The Wallace-Morris Agency, Inc.*, 200 F.3d 6, at 4-5).

134. *Id.* quoting *Oppenheimer Fund, Inc. v. Cassady*, 307 U.S. 369, 328 (1939).

135. *Id.* at 318.

136. *Ames v. Chem. Mfg. Co. (EV. 90000004)*, 1993 WL 148569, at *5 (D.N.C. May 14, 1993) (No. 77-1-266).

137. *Zubulake I*, 217 F.R.2d at 358.

138. *Id.* (emphasis added). The court in *Zubulake I* goes on to discuss five categories of electronic data and how the categories move from accessible to least accessible: (1) active, online data; (2) archives data; (3) offline storage/archive; (4) backup tapes; and (5) erased, fragmented or damaged data. *Id.* at 358-60. Typically, the first three categories will be accessible and the latter two categories will be inaccessible. *Id.* at 319-20. Accessible data does not need to be reconstructed or restored to be "reasonably accessible" data. It is automatically accessible. *Id.* at 330.

139. *Id.* at 324, see supra note 45 (discussing the analysis set forth by the court in *Zubulake I* regarding cost-shifting).

140. *Symantec Corp. v. Adolph Coors, Inc.*, No. C-97-26347-DS (SDCA, 1999 WL 56097, at *3 (S.D. Cal. Aug. 16, 1999).

141. *Fornell v. First Step Design*, 93 F.3d 128 (9th Cir. 1996).

142. *Novor Entm't, Inc. v. The Wallace-Morris Agency, Inc.*, 200 F.3d 625, 431 F.2d N.Y. 2002.

143. *McFet v. Ashcroft*, 202 F.R.2d 31, 18 (E.D. Cal. 2001).

144. *Wigington v. CB Richard Ellis, Inc.*, 200 F.R.2d 516, 572-73 (N.D. Ill. 2004) (upholding inclusion of this additional factor through Fed. R. Civ. P. 26(b)(3)).

145. *Id.* at 518.

146. *Id.* at 573.

147. *Id.* at 573. This factor will almost always tip the scales in favor of cost-shifting.

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In *Bridgepoint/Vericore*,¹⁶⁶ plaintiffs sought discovery of a chemical compound formula. Defendants asserted California Evidence Code section 1059, which provides that "[i]f he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the disclosure of the privilege will not tend to conceal fraud or otherwise work injustice."¹⁶⁷ The privilege exists to afford some measure of protection against unnecessary disclosure of "information that is essential to the continued operation of a business or industry."¹⁶⁸

A party opposing discovery of a trade secret must show that the privilege exists, then the requesting party must show more than just relevance; they must show the necessity of the information to the just adjudication of the action.¹⁶⁹

In *Flow Control*, the court looked to section 90.506, Florida Statutes (1991),¹⁷⁰ which provides that "[a] person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret if the disclosure of the privilege will not conceal fraud or otherwise work injustice."¹⁷¹ If a party asserts the privilege, then the trial court must determine whether the privilege exists.¹⁷² If trade privilege exists, then the party seeking production must show "reasonable necessity for the requested materials."¹⁷³ If production is then ordered, the court must set forth its findings.¹⁷⁴

Alternatively, if the producing party has a proprietary interest in the architecture of the database, the database may be shielded from discovery by the trade secret privilege. Such a shield is not impenetrable; the database may be discovered despite a finding of privilege. However, in such cases the court may be required to issue a protective order to limit any potential harm to the producing party.

The Tenth Supreme Court in *Donnerberg* ruled on the related question of when a party is obligated to produce evidence that it has custody to, but legally does not possess. In *re Kauri*,¹⁷⁵ involved a party in

possession of trade secret information belonging to a third party. The court analyzed the question of the meaning "possession, custody, or control" and concluded that simply becoming a party to litigation has access to data (including materials in its files), that does not necessarily give the party possession, custody or control. In *Kauri*, the party responding to discovery was subject to confidentiality agreements that restricted disclosure of the information. The district court held that disclosing the information in response to the document subpoena would require the party to "illegally" take possession of the documents. In *re Kauri* should encourage broader use of confidentiality agreements when sharing trade secret information.

5. The Growing Role of Voicemail in E-Discovery

Voicemail messages are emerging as a potentially powerful source of discovery.¹⁷⁶ "[T]here is nothing in theory and little in substance to distinguish [voicemail] from e-mail ... for the purposes of discovery."¹⁷⁷ But sifting through voicemail, unlike searching email, can be a manual process involving human listening, transcribing voicemail messages is lengthy and expensive process.¹⁷⁸ Although voicemail transcription software exists, the technology is in its infancy.¹⁷⁹ Problems such as accents, regional dialects, altered emotions (e.g., shouting, crying), foreign languages, proper names, and shortened expressions still stand in the way of accurate software-based transcription.¹⁸⁰ Moreover, voicemail cannot be filtered until after manual transcription, so parties could expend significant resources on voicemail discovery only to end up empty-

¹⁶⁶ *Bridgepoint/Vericore, Inc. v. Superior Court*, 9 Cal. App. 4th 909 (2001) (5/10/02).

¹⁶⁷ Cal. Evid. Code § 1060 (2005).

¹⁶⁸ *Bridgepoint/Vericore, 9 Cal. App. 4th* at 911-712 (quoting the *Los Rios v. Chaudhri* Federal Invention 1996 of the California Supreme Court).

¹⁶⁹ *Id.* at 712.

¹⁷⁰ *Flow Control, Inc. v. LOR, Inc.*, 815 So. 2d 1277, 1278 (Fla. Dist. Ct. App. 1997).

¹⁷¹ Fla. Stat. Ann. § 90.506 (West 2005).

¹⁷² *Flow Control, Inc.*, 815 So. 2d at 1278.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1270 (quoting *donnerberg Industries, Inc. v. Pross*, 673 So. 2d 540, 562 (Fla. 2001) (5/10/02)).

¹⁷⁵ *In re Kauri*, 124 S.W.3d 179 (Tex. 2003).

¹⁷⁶ See David D. Reardon, *Voicemail Potentially Becomes the Next Frontier of E-Discovery*, <http://www.legalintelligencemag.com/voicemail/voicemail.html> (last visited Jan. 28, 2006); see also Ron Heflin et al., *Clipping Edge: The Next Frontier in Electronic Discovery*, Legal Tech Monitor (May 2004), <http://www.ltmjournal.com/voicemail/publish.asp?tabid=22&pubid=142040-1> (last visited Jan. 28, 2006).

¹⁷⁷ Kenneth J. Wilbur, *Is Digital Discovery? Electronic Documents and Discovery in Civil Litigation*, <http://www.courtreporters.com/articles/e-discovery.html> (last visited Jan. 28, 2006).

¹⁷⁸ Joshua C. Bennett, *Kilpatrick: The Latest Front in the E-Discovery War* (November 12, 2003), <http://www.kilpatrick.com/articles/07/04/200404150007> ("[U]nlike email, voicemail does not generally have immediately useful built-in search capabilities. One must simply listen to the 'hot' and 'cold' lines of a voicemail, or the 're' information, to determine the general nature of the communication. Not, unlike voicemail, are transcribed or otherwise converted into searchable text, it is currently possible to review voicemail solely for relevance and privilege. In certain cases of voicemail may require hours, days or even weeks of tedious listening to uncover in an effort to determine what events fit into with the messages that a discovery dispute.")

¹⁷⁹ Charles S. Swartz, *Analysing the Importance of Voice Mail in Discovery* (May 20, 2005), <http://www.legalintelligencemag.com/voicemail/>.

¹⁸⁰ *Id.*

Electronic Discovery (Cont.)

handed. Still, voicemail can be valuable, persuasive evidence.¹⁴¹

Recent improvements in technology will allow voicemail to one day be as searchable as text-based emails. This new technology capitalizes on the fact that voicemail systems no longer depend on single tapes—voicemails are now stored electronically.¹⁴² These digital voicemails are stored on hard drives and can be saved (like emails) for as long as a company is willing to maintain the data.¹⁴³ Some companies presently use voicemail systems that send employees' voicemails as them as WAV attachments.¹⁴⁴ These voicemail-based-mails can contain such information as the incoming phone number, the date and time of the call, the length of the message, and an associated name (through a company's address book).¹⁴⁵ Also, several companies are attempting to eliminate the need for human transcription by customizing to develop software to automatically transcribe these digital voicemails.¹⁴⁶

Courts have begun to address the preservation of voicemail for discovery purposes. Courts have held that discoverable, electronically-stored data includes voicemail.¹⁴⁷ Although there are currently no cases where a party is sanctioned for spoliation of voicemail evidence, courts are starting to grapple with the issue.¹⁴⁸

5. Requesting Electronic Evidence

In requesting and producing electronic evidence, the key considerations in choosing available methods and tools include managing the gathering of the material, the privilege review and production of the material, and the analysis and sealing of the material.

1. Tools for Managing the Production of Electronic Data

A common method of addressing electronic evidence is to revert to the traditional form of document review and discovery: print out the information, review it for privilege and produce it to opposing counsel in paper form. Not only is this method inartful given the source of the original material, it is often far more expensive than using electronic search engines specifically designed to support the production of electronic evidence, including e-mails, databases and document servers.¹⁴⁹ Such software allows for the online systematic and organized gathering of electronic data as well as the privilege review and preparation of a privilege log. The produced data is then linked with a search engine and together they support evidence evaluation and analysis.

The discovery of electronic information presents challenges to the respondent, as well as to the proponent of a request for such discovery. For example, is the respondent obligated to take steps to produce all electronic records, including those that it had intended to delete? To what lengths must the respondent go to reconstruct deleted documents? Will the proponent be forced to retain a technical expert to collect and/or preserve electronic documents?¹⁵⁰

2. Consider Requesting Data in Original Electronic Form

As previously noted, the one and only method of electronic data can be enhanced if the material is produced in electronic form. In some cases, the data is not useful unless provided in electronic version. In one case, the trial court ordered the disclosure of records to computer tape format instead of on a hard copy. In that case, the agency maintained the requested files in computer format, the files could be reproduced on computer tapes quickly and at minimal cost, and the same information provided on printed copy would use more than 1,000,000 sheets of paper, cost more than

¹⁴¹ See *United States v. Smith*, 15 F.3d 1013 (9th Cir. 1998) (quoting statement of Judge making offer among other evidence of the gift, a cellmate's recollection of defendant's awareness of letter information and check trading activities).

¹⁴² *Supra*, note 13, at 3.

¹⁴³ *Id.*

¹⁴⁴ *Id.*, *supra*, note 13.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (Noting, *ibid.*, <http://www.vocaltec.com/tech/voicemail.html> that voicemail can be stored, 2000).

¹⁴⁷ See *Protopapas v. U.S. Dep't of Justice*, 67 Fed. Cl. 288 F.3d 58, 45 (D. Minn. 2003) ("the phrase 'electronic records' . . . encompasses voicemail's storage in a database, 48 Fed. Cl. 2000 (7/24/00) and 488 (D. Kan. 2000) ("[U]nquestioned that not only electronically-stored information includes, but is not limited to, voice mail messages and files, backup voice mail files, email messages and files, backup email files, deleted emails, data files, program files, backup and restore tapes, memory files, system history files, and the information stored in normal, graphical or audio format, web site log files, video files, audios, and also electronically-stored information"); *Shaw v. American Republics of Central America*, 60 Fed. Cl. 455, 458 (2004) ("As used in this Order, 'record' means any . . . recording, report, spreadsheet, statement, summary, database message record or log, transcript, video, electronic, similar, analog, work paper . . . or any other form or group of documentary material or information, regardless of physical or electronic form or characteristics, and any information stored, and topics, notes, and recordings thereof.") (emphasis added).

¹⁴⁸ See *United v. Anderson*, 2003 F. Supp. 2d 59 (D. Ark. 2003) (advising motion for sanctions for spoliation of voicemail evidence, observing "[I]f [plaintiff] thought that a search had been conducted to the extent that [defendant] would send a copy of [plaintiff's] e-mail and voicemail messages to the court, he would not be [sanctioned] for spoliation.")

is a word that [plaintiff] did not use in the messages on this tape.")

¹⁴⁹ See, e.g., National Response House Page, <http://www.nationalresponsehouse.com> (last visited Oct. 15, 2003) (regarding electronic discovery software developed by Khosravi Research, Inc. of Houston, Texas).

¹⁵⁰ See *Shaw v. American Republics*, Discovery Dispute, *Shaw v. American Republics*, 2003 F. Supp. 2d 59 (D. Ark. 2003), at 3.

Electronic Discovery (Cont.)

\$10,000 to print, require five to six weeks to produce and would cost the petitioner hundreds of thousands of dollars to reconstruct to a computer-readable format.¹⁷³

In another proceeding, a court granted a writ of mandamus requiring the police department to furnish the petitioner with copies of certain magnetic tapes and paper copies of record logs of information stored in tapes, where the petitioner presented legitimate reasons why paper copies of records on tape would be insufficient and impracticable. In that case, under the Illinois Public Records Act, the petitioner was entitled to either copy the computer tapes that she requested or have the agency loan her the tapes so that she could copy them.¹⁷⁴

The new federal rules contemplate requesting data in native form.

3. Checklist for Requesting Electronic Data

The following checklist for discovery of electronic evidence and other computer-related documents can be tailored to meet the demands of the large document case:

A. Request that the electronic information be submitted in computer-readable form. This allows counsel to perform key word searches to locate relevant information and to reformat the information in a preferred form, such as a table or list. A trial court may order a party to produce information in computer-readable form, on a disk or a CD, even though the precise information has already been supplied in a printed form.¹⁷⁵

B. Determine how the costs for obtaining and handling the electronic information will be borne. Discuss the sharing of costs with opposing counsel. Utilize new forms of technology for reviewing data. See, www.stmcity.com or www.stmcity.com as examples.

C. Identify potentially relevant electronic information and the format to which it might be stored, such as e-mail, graphics files, or word processing files.

D. Discuss technology issues such as the sharing of discovery questions, the specific computer systems involved in the litigation and the potential need for computer forensics assistance to recover electronic information with a computer expert. Determine if a

computer expert may be needed to assist or justify an trial.

E. Consider obtaining a protective order for certain electronic information, such as information that contains trade secrets or is computer source code.

F. Use discovery to obtain information on the computer systems used by the opposing party, including the type of hardware, operating systems, and applications used.

G. Discuss the forensics data preservation is required. In some cases, parties should preserve electronic data using a forensically verifiable means that preserves the integrity of the data on hard drive. Copying data from one repository to another can impact metadata and other information that could, in certain cases, constitute relevant evidence to the case. If there is an issue whether and when an employee created a document, metadata would provide some information pertinent to this issue. Additionally, in many situations, data that is "deleted" from a user's active computer can be accessed through forensics means by analysis of hard drive data.

Certain applications facilitate a more forensically verifiable means of extracting and reviewing hard drive data, including applications that purport to copy, bit by bit, all the data on a hard drive. These applications, including the BitCrawl application from Guidance Software, allow for a higher level of data verification to better reflect the actual information that was on each user's hard drive and to provide an aspect the ability to potentially extract deleted files. Other options include extraction and analysis of the actual hard drives from user's systems. See, e.g., <http://www.guidancesoftware.com/corporate/downloads/whitepapers/sgljournal10-verifier2006.pdf>.

In any of these cases, a well trained professional experienced in data retrieval and use of these tools should be hired early in the discovery process. These experts should have experience identifying in documentation, application of chain of custody principles and data analysis techniques.

H. Determine how counsel will present and use the electronic information that is discovered. Processing may involve searching through the information. Use of the information may involve the production of trial exhibits.¹⁷⁶

Other aspects of electronic information, which are not considered part of the body or context of a message or file but can be of immense importance, include data

¹⁷³ *Sturgeson Publishers, Inc. v. New York City Dep't of Bklyn.*, 2005 WL 32 682 (N.Y. App. Div. 1st Dep. 2005).

¹⁷⁴ *State ex rel. Skaggs v. Cleveland*, 339 N.E.2d 665 (Ohio 1992).

¹⁷⁵ *Nat'l Union Bldg. Corp. v. International Bldg. Indus. Co.*, 454 F. Supp. 1077 (S.D. Pa. 1983).

¹⁷⁶ 51 Am. Jur. 2d on Facts in Discovery and Production of Electronic Mail or Diskette ¶ 14 (2005).

Electronic Discovery (Cont.)

and time stamps reflecting the date of saving or transmission and the date of receipt, and a message's list of recipients. The computer-generated "history" of a document may be important in determining a particular sequence of events in dispute. Automatically generated evidence of when a computer file was edited, when a utility was last used, or when an e-mail message was transmitted by the sender or opened by the recipient may be useful tools to the litigant. The list of e-mail recipients, including those who were actual and third generation recipients, can help prove motive, knowledge, notice, libel, or a waiver of a privilege, for example. In short, counsel should carefully check date and time stamps and the recipient data, in addition to checking the body of the electronic information obtained through discovery.¹³⁶

Indeed, substantial information on computer-readable media may be useful to litigants even though it does not appear on a printout. For example, information relating to the programs and coding used to input the data may provide valuable insight into business methods when analyzed by a qualified computer expert.¹³⁷ In one case, where a computer utilized in a particular business had been programmed with standards that prevented racial discrimination, its information was held to be fully discoverable.¹³⁸ One court has held that when statistical analyses have developed from more traditional records with the assistance of computer techniques, the underlying data used to compose the statistical computer input, the methods used to select, categorize, and evaluate the data for analysis, and the computer outputs are all proper subjects for discovery. Consequently, the discovery requests which seek minute information about the defendant's computer capabilities, "including information about their computer equipment, raw data, programs and data management systems, in addition to the production of tapes which contain information about past and present policyholders . . . [is] not per se irrelevant."¹³⁹ Conversely, discovery of computations and information from an automated litigation support system (ALIS) should not be allowed in situations where the source documents from which the ALIS received information are available to the responding party in their original form.¹⁴⁰

In responding to a request for electronic evidence in Texas state court proceedings, it is particularly important to follow the procedures outlined in the Texas Rules of Civil Procedure and to press up the basis of any objections.

Texas Rule of Civil Procedure 196.4¹⁴¹ outlines the basis for requesting and responding to requests for electronic evidence. If the responding party plans to assert that the requested electronic or magnetic data responsive to the request is not reasonably available to the responding party in its ordinary course of business, then the responding party must assert an objection to the request on this ground.

Further, in *In re GE Home, Inc.*,¹⁴² the party responding to a request for electronic evidence objected on the grounds that the request was overbroad and that it violated the Electronic Communications Privacy Act. The Texas Supreme Court held that the objecting party failed to produce evidence supporting its objections, therefore the objections were overruled and the trial court did not abuse its discretion in ordering the production of the electronic data.

(This article is the first three parts of a three-part comprehensive paper on this topic. The other two parts cover: Use of Electronic Evidence at Trial, Document Production Policies, Storing Large Information Files, Privilege and Ethics. The full article is available at <http://www.lawbusiness.com> in the Knowledge Center section, Publications.)

4. Responding to the Request for Electronic Data

¹³⁶ *Id.* see, *Int. Process or Factors in Discovery and Reconstruction of Electronic Data as Evidence* § 2 (2005).

¹³⁷ *Id.* see, *Int. Process or Factors in Discovery and Reconstruction of Electronic Data as Evidence* § 34 (2005).

¹³⁸ *Davis v. Anderson & Davis*, 89 F.R.D. 160, 194 (S.D. Ohio 1986).

¹³⁹ *See* *Poling Material, Inc. v. Chatham Lumber Co. (Ill.)*, 375 N.E.2d 1062.

¹⁴⁰ *Id.* see, *Int. Process or Factors in Discovery and Reconstruction of Electronic Data as Evidence* § 34 (2005).

¹⁴¹ TEX. R. CIV. P. 196.4.

¹⁴² 2005 CYBERCASE, 2005 WL 38314726 (2005).

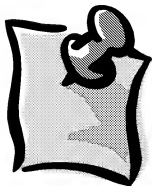


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DON'T MISS THE CELEBRATION!

Mark your calendars – CAPA will be hosting a Paralegal Day
Celebration on October 23rd.



CLE NOTICE!

September 20th - Claiborne (Clay) Cowan with Foster Malish Blair & Cowan, LLP speaking on "Ten Reasons to Plan Your Estate Now"

The event is being sponsored by Lakeside Mediation and will be providing meals from Apple Annie's.

RSVP no later than 5:00 p.m. on 9/15 by emailing
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As a member of the Capital Area Paralegal Association (CAPA), you are a vital part of our legal network. As an industry, we are committed to excellence in every area of work, life, community and our legal profession. Please join us at one of our events, attend a committee or board meeting or participate in a study group. We encourage you to bring a co-worker to one of our luncheons or volunteer with VLS. Please send updates to this directory to events@capatx.org.



VOLUNTEER & COMMUNITY PROJECTS

◆ HELP NEEDED ◆

Please consider volunteering as CAPA's **Community Projects Chair** or **Volunteer Legal Services Chair**. You can network and take on a leadership role with CAPA while giving back to your community! If you're interested, please contact Michele Flowers Brooks at MFBrooks@capatx.org.

Volunteer Legal Services (VLS)

CAPA is pleased to announce that a \$250 donation will be sent to VLS on behalf of CAPA to support its amazing efforts in Central Texas.

VLS is a non-profit organization that assists low-income Texans with their legal problems, including providing free legal clinics and finding attorneys willing to work for free.

If you would like to volunteer with VLS, please call 512.476-5550.

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Drop contributions in the Flower Buckets on your luncheon table at our monthly meetings.

Aug-Oct 2006 | Casa of Travis County | Advocates for abused and neglected children in Travis County since 1985 |

Please place your change, bills and/or checks into the flower pots located on the tables

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Charity events with a team effort!

Looking for participants for charity walks, runs, rides and other events in the Austin metroplex area? TO SIGN UP or for more information, please contact CAPA Public Relations Chair, Vanessa Petrea, via email at VPetrea@capatx.org



MONTHLY LUNCHEONS

Last Wednesday of each month
11:45 am - 1:15 pm
(CLE credit pending / NALA and TELS)

Green Pastures Restaurant

811 West Live Oak | Reservations Required by 12 pm Thursday preceding | Members \$15 | Non-members \$17 | No meal \$0 | Late RSVP Fee \$20 | RSVP@capatx.org

Plan to join us each month to network, chat with friends, meet new vendors and eat fabulous food provided by the chefs at Green Pastures.

OCTOBER 25 | Speaker: Dana DeBeauvoir | Topic: Researching Electronic County Clerk Records | TELS Approved/NALA Pending.

NOVEMBER 29 | Speaker: Andrew Weber, former Clerk for the Supreme Court of Texas |

Topic: Internal Procedures for the Supreme Court | TELS Approved/NALA Pending.

JANUARY 31 | Speaker: The Honorable Lee Yaekel | Topic: TBA | TELS Approved/NALA Pending.



CONTINUING EDUCATION (CLE) OPPORTUNITIES

NALA Exam Schedule and Application Filing Deadlines:

December 1-2, 2006 - Examination
October 1, 2006 - Filing Deadline
October 16, 2006 - Late Filing Deadline

March 23-24, 2007 - Examination
January 15, 2007 - Filing Deadline
January 29, 2007 - Late Filing Deadline

July 20-21, 2007 - Examination
May 15, 2007 - Filing Deadline
May 30, 2007 - Late Filing Deadline

Study for Success

A Study Group to prepare for the NALA Certification Exam is meeting each week beginning August 21, 2006. Watch for news about the time and location.

For CAPA CLE or Study Group information, contact Kathy Harkins 512.478.1657 x 155; CLE@capatx.org or StudyGrp@capatx.org.

NALA Campus.com Self Study Programs & NALA Campus LIVE

The Internet offers continuing legal education seminars for paralegals and legal assistants nationwide. For Info.: www.nalacampus.com



MEMBERSHIP PRESENTATIONS

To schedule a Membership Presentation for your firm, department, school or company, please contact CAPA Public Relations Chair, Vanessa Petrea, at VPetrea@capabx.org



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The CAPA Board of Directors meets on the 2nd Tuesday of each month at 12:00 p.m. at the Holiday Inn at Towne Lake located at 20 N IH 35. **MEMBERS ARE WELCOME AND ENCOURAGED TO ATTEND.** To RSVP and/or to provide information to be included on the Agenda, please contact Michele Flowers Brooks by calling 391-4971 or via email at MBrooks@capabx.org

♦ HELP NEEDED ♦

Public Relations Committee

The Public Relations Committee is in need of individuals who are persuasive writers and eloquent public speakers. If you're interested in being a part of CAPA's PR Committee, please contact Vanessa Petrea by calling 512.322.5843 or via email at VPetrea@capabx.org

Sustaining Member Liaison

CAPA is looking for an outstanding individual who loves to network and can facilitate communications between the Sustaining Members/Vendors and CAPA board members. For more information about this exciting position, please contact Michele Flowers Brooks at MBrooks@capabx.org



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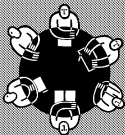
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Mark your calendars for **Monday, October 23, 2006!** CAPA will be hosting its annual Paralegal Day Celebration. Plan to join us as we honor your hard work and dedication to the legal field. There will be food, drinks, prizes, and great networking so don't miss out! Watch for more information on this event in the coming weeks.

CAPA HOLIDAY PARTY

CAPA is planning a fantastic Holiday Party! If you enjoyed the party at Lucy's Boatyard last year, you won't want to miss this event. More details about the CAPA Holiday Party will be available soon.

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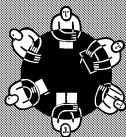
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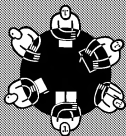
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Amount enclosed: _____

Membership Update Form

We want to keep in touch with you, our members. So that you can receive the newsletter or so we can contact you, please keep us informed of your current address(es), telephone number(s) and place of employment. As this information changes, please go to www.capatx.org/address_change.html or complete this form and send it to:

Cheryl Jung
Thompson Coe Cousins & Irons, L.L.P.
701 Brazos, Suite 1500 Austin, Texas 78701
703-5049—Phone 708-8777—Facsimile

NAME: _____

EMPLOYER: _____

EMPLOYER'S ADDRESS: _____

ZIP _____

WORK PHONE: _____ WORK FAX: _____

WORK E-MAIL: _____

HOME E-MAIL: _____

AREA OF CONCENTRATION: _____

HOME ADDRESS: _____

ZIP _____

HOME PHONE: _____

I want to be included in CAPA's Group Email for CAPA reminders & alerts using my... ☐ HOME ☐ WORK email address.

I want to receive my U.S. Postal mail at ... ☐ HOME ☐ WORK

I... ☐ Want ☐ Do Not Want my home information printed in the directory.